

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

January 25, 2006 Session

STATE OF TENNESSEE v. CHESTER DALE GIBSON

Direct Appeal from the Criminal Court for Putnam County
No. 03-0489 Lillie Ann Sells, Judge

No. M2005-01422-CCA-R3-CD - Filed March 24, 2006

The Defendant, Chester Dale Gibson, was found guilty of false imprisonment, especially aggravated kidnapping, and aggravated assault. The trial court sentenced the Defendant to an effective sentence of twenty years in prison. On appeal, the Defendant contends that: (1) the evidence is insufficient to prove that the victim suffered “serious bodily injury,” a necessary precursor to the jury finding him guilty of especially aggravated kidnapping and aggravated assault; and (2) the trial court erred by not merging his convictions for sentencing. We conclude that the Defendant’s conviction for false imprisonment should have merged into his conviction for especially aggravated kidnapping, and we therefore reverse that finding of the trial court. In all other respects, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part,
Reversed in Part, and Remanded**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

J. Liddell Kirk and Tommy K. Hindman, Knoxville, Tennessee (on appeal) and Marshall Judd, Cookeville, Tennessee (at trial), for the Appellant, Chester Dale Gibson.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William E. Gibson, District Attorney General; Tony Craighead and Gary McKenzie, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant’s convictions for crimes against the victim, Sandy Huff. The Defendant was indicted on one count of especially aggravated kidnapping

accomplished with a deadly weapon, one count of especially aggravated kidnapping alleging serious bodily injury, and one count of aggravated assault. At the Defendant's trial on these charges, the victim testified that, in October of 2002, she began dating the Defendant, and they dated "on again/off again" until the beginning of May of 2003, when she decided that she did not want to be with him anymore. Huff admitted that, at this time, she used drugs, specifically methamphetamine, every day, but she stopped using drugs three months prior to the trial in this case. On May 20, 2003, early in the morning, the victim saw the Defendant at a house near where her sister Shirley lived, and she wondered what he was doing in the area. She said that the two began to talk, and they went back to her sister Shirley's house. Shirley asked Huff if she wanted to go with her to take Shirley's daughter to school, and she agreed and told the Defendant to stay at the house with Shirley's friend, Clayton. Huff told the Defendant not to go anywhere in her car because she left her car at the house.

Huff testified that, when she returned to the house, she, Shirley, Clayton, and the Defendant, got into Huff's car and began riding around. Shortly thereafter, there was an intense argument, the Defendant got agitated at Shirley and threw up his hand as if to strike her, and grabbed Huff's cell phone and threw it out the window, which made Huff "very angry." Huff said that Clayton and Shirley decided they wanted to go home, so the Defendant drove them home, and then got out of the car and started walking. Huff told the Defendant to get back into the car, and she drove him to the spot where he threw out her phone to look for the phone. She said that the Defendant got out of the car, found her phone, and then told her to let him drive since she was upset. Huff said that, when he got into the driver's seat, he started "pounding" her face. She recalled that, first, he hit her in the nose, which "busted" her nose and chipped her tooth. Huff remembered spitting part of her tooth out and blood being everywhere. Huff said that the Defendant hit her in the face approximately three times, and then he grabbed her by her head and slammed her face into the windshield and the dashboard of the car. Huff said that she bled as a result of her injuries and she was in "very bad" pain.

Huff said that the Defendant then took off driving, saying that he was "really moving." She described him as "in a rage," and she thought "I've got to get some help." Huff pulled the steering wheel trying to get someone to pay attention to the car or to "wreck" the car. Huff said that the Defendant pulled over and got out of the car, and she attempted to run from the car. The Defendant caught her by her leg and pulled her from behind by her leg and put her in the trunk of the car. Huff said that the Defendant had a knife, and he cut her foot while stabbing her. She said that she was kicking and screaming as he closed the trunk of the car. Huff said that she started pulling wires in the trunk in an attempt to diffuse the tail light or break light. Huff recalled that there was a small gap in the rear of her trunk through which she could see light, and she attempted to throw things from her trunk out of the gap. Huff said that she was screaming and making noise, but the Defendant turned up the radio so that he could not hear her. At some point, the Defendant asked her, "Where is your God now?" Huff said that she hit the top of the trunk repeatedly, which caused her to hurt her hands.

Huff recalled that, at one point, she started to panic because she was running out of air. She said that she could not breathe, but she calmed herself back down because she did not want to use up all the air. She did not know how long she had been in the trunk. Huff said that she

got “really sleepy” and made a pillow out of her sweater. She said that her head was hurting so badly that she lay down and went to sleep. Before she fell asleep, she said a prayer thinking that she was going to die. Huff said that, as she was going in and out of consciousness, she heard a lady’s voice, and she thought that it was the Defendant’s grandmother’s or aunt’s voice. She said that she again started beating on the trunk, and the Defendant got in the car, started it and left the house. Huff assumed from what she heard that they were at the Defendant’s grandmother’s house in Sparta, Tennessee, and she attempted to ascertain where the Defendant was going so that she could get away if he let her out of the trunk.

The next thing that Huff recalled was the Defendant opening the trunk and telling her to get out. She said that they were at the house of one of the Defendant’s friends, Jimmy Gardner. The Defendant forced his way into the house, and he threw a towel at Huff and told her to clean herself up, but it hurt too badly to even touch her face. The Defendant got a “big black pump shotgun,” and she got back into the trunk. Huff said that she was distraught, confused, and scared to death.

Huff got out of the trunk again at another of the Defendant’s friends houses. She said that the Defendant pointed the gun at her and told her that he was going to kill her and himself. The Defendant held the gun to himself and said that he was going to kill himself because of Huff. Huff said that the Defendant’s friend was not home, and the Defendant forced his way into the house where he gathered a duffle bag. Huff did not run at this time because she said that the house was “isolated” by a river and that there was nowhere to run. Huff said that, when they got back outside, she told the Defendant that he could not put her back in the trunk. She said that she was hurting so badly that she could hardly hold herself up. Huff remembered that there was a long dirt, gravel road, and the Defendant stopped the car in the middle of the road, and she thought that he was going to put her back in the trunk. Huff said that she saw a house, and she got out of the car and ran as fast as she could toward the house. The Defendant sped up after her, hit her with his fist, and put her back in the car, but not in the trunk. He said to her, “[O]h, my God, I’ve got to get you to a hospital.” The Defendant did not take her to a hospital, but he took her to the house where his aunt, Tammy Centers, his uncle, Bobby Centers, Sr. (“Bobby Sr.”), and his cousin, Bobby Centers, Jr. (“Bobby Jr.”), lived, which was in White County near where his grandmother lived.

Huff testified that, when they arrived at the Centers’ house, the Defendant got out of the car, said he was going to use the phone, took the car keys, and told Huff to stay in the car. Huff said that she got out of the car, saw the Defendant on the porch with his aunt, and said that she had to go to the bathroom. The Defendant said that she could go inside to use the restroom. When Huff went inside, she saw Bobby Jr., who was eighteen, and she asked him to help her by calling the police, letting her leave, or doing anything he could to help her. She said that he looked scared, but he shook his head and said okay. Huff testified that she was hurting very badly physically and was about to lose consciousness. Huff said that no one called for help, and, when she went outside, she saw the Defendant on the phone, and he said that he was talking to Bobby Sr. Huff then started screaming for help because she considered Bobby Sr. a friend. At that point, Tammy Centers said that they had to leave, which they did.

Huff said that, when they left, the car started “messaging up” so the Defendant stopped at a Burger King in Cookeville, where the Defendant’s mother works. Huff said that she felt at this point that she was going to be okay since she was around people. The Defendant’s mother asked Huff what had happened, and Huff replied that the Defendant had done this to her. Huff used the phone to call Bobby Sr., and, while she was waiting for him to come and get her, the Defendant told her that he would kill her if she called the police. When Bobby Sr. arrived at the Burger King minutes later, she got into his car, and he took her to the hospital. Huff recalled fading in and out of consciousness, and she remembered Bobby Sr. saying, “[D]on’t you die on me.” Huff did not recall arriving or being admitted to the hospital.

Huff described her injuries, saying that she suffered a cigarette burn to her hand, a cut to her foot, a “busted” lip and nose, knots on her head the size of golf balls, bruises to her arms, and handprints around her neck. She said that the Defendant repeatedly hit her around her temples and they were black and bloody. Huff also had seven to ten fractures in her face. The police were called to the hospital, they took pictures of Huff, and those pictures were admitted into evidence.

On cross-examination, Huff said that, prior to any argument, the Defendant drove her, Shirley, and Clayton, to a Dollar General Store, and she and Clayton went into the store. In the store, there was a girl who did not like Huff, and they “exchanged” words. After she got back into the car with the other three, the argument started, but she did not recall the subject of the argument that occurred when she was in the car with Shirley, Clayton, and the Defendant. She said that she was “probably not in the best mood,” but she denied that this argument was about Shirley’s relationship with the Defendant. She agreed that she was not wearing her glasses when she drove the Defendant back to look for her cell phone. Huff also agreed that she had taken a Xanax pill the night before this incident, said that she had not used drugs for three or four days before this incident but conceded that she smoked marijuana the night before this incident.

Huff said that she hit the Defendant only in self-defense and said that she was scared when he hit her. She agreed that she previously testified that she never hit him or tried to defend herself. She agreed that she previously said that the Defendant flipped a cigarette at her, and she threw it out the window. Huff agreed that they were on Highway 56, which is a busy road, when the Defendant forced her into the trunk, but she did not see anyone on the road at that time. Huff conceded that she had previously testified that she did not remember whether the Defendant pointed the gun at her, but she maintained that the Defendant said that he would kill her and kill himself. Huff also agreed that she had not mentioned at the preliminary hearing the knife that the Defendant cut her with but said that she did not do so because she was not asked. Huff reiterated that, the next time that the Defendant let her out of the trunk, he hit her in the jaw and blood started coming out her mouth and she was choking on the blood. Huff said that this was when the Defendant said that he had to take her to the hospital, and she denied that she told him that she did not want to go to the hospital.

Huff testified that she visited the Defendant two times in jail because she wanted to see if he felt any remorse. When she visited him, he told her that if she testified that he forced her into

the trunk he would kill her and kill her niece. She said that she did not testify about this at the preliminary hearing because she was scared.

Roger Cooper, a Deputy Sheriff in Putnam County, testified that he was called to the hospital where Huff was receiving medical attention. He described Huff as “extremely beaten up.” Her mouth was swollen, with her lip sticking much farther out than normal. He said that she had a lot of swelling in her nose, blackened eyes, and swelling around her face. She also had bruises around her neck, on her hands, and foot. He said that she appeared to be in a great deal of pain. Deputy Cooper said that Huff seemed very scared. The deputy testified that he arrested the Defendant and, when he did so, the Defendant said “to be careful [because] his hand was broke[n].” On cross-examination, the deputy agreed that he did not see any scratch marks on the Defendant. The deputy was unsure of whether Huff mentioned in the first interview that the Defendant had a gun or a knife, but he said that she was in pain and their interview got interrupted several times. The deputy was sure that at some later point Huff told him that the Defendant had a gun and a knife.

Brenda Gunter, the Defendant’s aunt, said that she works with the Defendant’s grandmother at a childcare center. She said that the Defendant came by himself to the daycare on May 20, 2003, between 12:15 p.m. and 2:00 p.m. The Defendant walked into the kitchen and seemed “a little hyped up” but that was not unusual. Gunter recalled that the Defendant said that he was trying to get in touch with Bobby Sr. because he had been in a fight with some guy who had been talking about Bobby Sr. The Defendant asked Gunter if she thought that his hand was broken, and Gunter described his hand as being red and swollen. Gunter asked the Defendant what he had done, and he said that he had been in a fight with a man. Gunter said that she was unsure of whether to believe the Defendant because she assumed that the Defendant wanted money. The Defendant also told her that he was going to leave town, which he “says many times.” Gunter said that the Defendant “[is] always . . . in some kind of trouble and needs money.” The Defendant asked Gunter for ten dollars and said that he needed gas money. Gunter recalled that the Defendant was driving the car that “h[e] and [Huff] were supposed to be living in at the time.” Gunter asked the Defendant where Huff was, and the Defendant responded that she was at Shirley’s house. On cross-examination, Gunter said that the Defendant parked his car near the door, and Gunter did not hear any screaming or beating on the trunk. She said that she did not see anyone else in the car with the Defendant.

Bobby Wayne Centers, Jr., who is referred to as “Bobby Jr.,” testified that he is eighteen years old, is the Defendant’s cousin, and he lives approximately 100 yards from the in-home daycare center where Gunter works. He said that, in May of the year before trial, he was home with his mother during the afternoon when the Defendant and Huff arrived at their house. He said that they pulled up to the trailer, got out of the car, and used the phone. Bobby Jr. said that he did not speak with Huff while the Defendant was on the phone, and he described her appearance stating that her mouth was swollen and one of her eyes was black. Bobby Jr. agreed her condition was “pretty bad,” but he did not ask what had happened to her even though he was worried about her. He said that, at one point, he and Huff were in the house alone, and she asked to use the restroom, but she did not ask him anything else.

The State's attorney asked Bobby Jr. if he recalled being interviewed by the State's attorney, and Bobby Jr. said "yes." The State's attorney asked Bobby Jr. if he had previously told the State's attorney that Huff asked him to keep the Defendant at the trailer and let her leave, and Bobby Jr. denied ever so stating. Bobby Jr. agreed that he is scared of the Defendant and that he was crying during the interview because of his fear. He also agreed that he was scared for Huff because of what the Defendant had done to her, which he agreed appeared to be a serious beating. Bobby Jr. said that he did not think that Huff begged anyone to allow her to leave by herself, but he agreed that she was crying when she went to clean herself up in the bathroom. Bobby Jr. denied ever telling the State's attorney that Huff asked him to call for help, and he denied saying that he did not call for help because the phone was disconnected.

On cross-examination, Bobby Jr. testified that he does not work but goes to school seeking his GED, and his mother supports him. He did not finish high school. He said that he was scared when the State's attorney and investigator came to interview him, and he "just told them anything" when he wanted them to leave. He said that his mother was there and got mad and asked the two men to leave. Bobby Jr. felt like these two men were trying to put words in his mouth.

On redirect examination, Bobby Jr. again denied that Huff asked him to call police. He then agreed that, when he saw Huff, he knew that she had been beaten up badly by his cousin. He said that he did not call police on his own because he thought that his mother or grandmother would call the police. He agreed that the police should have been called.

Bobby Centers Sr. testified that he is the Defendant's uncle and Bobby Jr.'s father. Bobby Sr. said that he took Huff to the hospital on May 20 after he picked her up at a Burger King that afternoon at around 3:00 or 4:00 p.m. He described Huff as "drooling and crying," her "lip was fat," and she was "hysterical." Bobby Sr. denied seeing a bruise on Huff's head. He said that he took her to the emergency room because "she looked like she needed to go to the hospital." Bobby Sr. said that the Defendant called him and said that he needed a ride and that the Defendant and Huff had been fighting. Bobby Sr. told the Defendant to take Huff home, and he would meet the Defendant there. He also told the Defendant that he did not need to be with a woman that he had to hit. Shortly thereafter, Huff called Bobby Sr. from the Burger King, and he went to pick her up and take her to the hospital. He stayed at the hospital for approximately one hour waiting for the police.

On cross-examination, Bobby Sr. said that, when he got to Burger King, Huff was inside her car. When Bobby Sr. told Huff that she needed to go to the hospital, Huff said that she did not want to go but wanted to go find the Defendant. Bobby Sr. told her that the only place that he was going to take her was to the hospital. Bobby Sr. testified that Huff previously worked for him at Homestead Lounge, and he fired her, later rehired her, and she quit. He said that the customers were not happy with her and that the register was short.

On redirect examination, Bobby Sr. denied telling the State's investigator that he almost did not recognize Huff because of the swelling in her face. Bobby Sr. said that he took Huff to the hospital because anyone who is "beat[en] up at all" needs to go to the hospital. He disagreed

that there are degrees of being beaten up. He conceded that he took her to the hospital because he was concerned for her health.

Dr. Brian Samuel, a physician at Cookeville Regional Hospital, testified that he was working in the emergency room on May 20, 2003, when Huff came in. Dr. Samuel identified Huff's medical record, which showed that she was admitted into the hospital at 5:50 p.m. The doctor said that Huff sustained multiple fractures of the maxilla area nasal bone, in the area of her nose, and multiple fractures to the eye area. Huff also had an injury to her foot, but an x-ray revealed that there was no fracture and a neck sprain. The doctor performed a toxicology test on Huff, and she tested positive for a class of drugs similar to Valium, a class of drugs similar to marijuana, and methamphetamine. Dr. Samuel testified that methamphetamine can remain in a habitual user's blood for two to four days. The doctor noted that his records indicated, "Several tries to ask where assault happened, by boyfriend, put me in trunk in Putnam County, then took me to White County in trunk."

On cross-examination, the doctor agreed that the medical report showed that Huff requested another doctor and that she unhooked the monitor herself and followed the doctor to the medical station, but he did not have any independent recollection of those incidents. Dr. Samuel agreed that he circled "moderate" with regard to the severity of Huff's pain. The records also indicated that the victim was released at 18:15, or 6:15 p.m. The doctor conceded that it is possible that the interaction of all of the drugs that were present in Huff would cause someone to imagine things. The doctor agreed that some of the adverse side effects of methamphetamine could include irrational thoughts and beliefs and paranoia. The doctor testified that Huff did not appear to have a dental injury that was apparent to him at the time. Dr. Samuel said that the victim indicated that she was pushed and that she was not hit by any object.

The State recalled Huff, and she testified that she had a small cut to the bottom of her foot. She said that when she was jumping over her bucket seats the Defendant cut the bottom of her foot with a knife.

Kathy Ford, the Defendant's mother, testified that she was working at a register at Burger King when this incident occurred. Ford saw Huff come into the restaurant and noticed that Huff had a black eye and her mouth was "busted." Huff wanted some money to use the telephone, and Ford gave her four quarters, offered to make a call for her, and got her something to drink. Ford said that Huff called Bobby Sr. to come and get her, but Huff did not call the police. Ford's manager asked Huff if Huff needed medical assistance or the police, and Huff said "no" that she was in a car wreck yesterday and was okay. Ford said that Huff stayed at Burger King for approximately twenty minutes, and Ford walked outside with her when Huff left. Huff got into her car, and Ford went back inside to get something else to drink. Before she got to the other side of the counter, Bobby Sr. came into Burger King. Ford said that Bobby Sr. went to where Huff was, and she saw Bobby Sr. and Huff leave together.

On cross-examination, Ford said that Huff was crying, but she was still calm. Ford said that her manager asked Huff if she needed help, but they did not call for help because Huff said she did not need any and wanted to be left alone. Ford looked at pictures taken by the hospital

and said that she did not notice that Huff had a bloody nose. She also did not notice the knot on her head and explained that Huff had her hair down covering the knot. Ford testified that she would have called for help had she seen these injuries.

Tammy Centers testified that the Defendant is her nephew, and, in May of 2003, he and Huff came to her house. Centers recalled that the Defendant was driving Huff's car with Huff in the passenger's seat when they pulled into Centers' driveway. Centers said that, after they got out of the car, Centers and the Defendant stayed on the front porch, and Huff went inside to use the restroom. Huff also asked to use the phone while she was inside, but Centers did not recall whether she actually used the phone. Centers said that Huff did not ask her to call the police or an ambulance. Centers thought that if Huff wanted help she would use the phone to call for it herself.

On cross-examination, Centers said that, when Huff arrived, she had a black eye and a "busted mouth," and her lip was "swollen real[ly] big." She conceded that she had used the words "swelled up" and "disfigured" to describe Huff's appearance. Centers agreed that, while Huff and the Defendant were at her house, they got into an argument and the Defendant raised his hand. At this point, she said the Defendant's name, and he said that he was not going to do anything. Centers assumed that the Defendant had caused Huff's injuries. Centers agreed that the State's Attorney and the State's Investigator were polite to her when they came to interview her for this case.

The Defendant testified that he is twenty-eight and is incarcerated in the Putnam County Jail for the charges against him. He said that before he was incarcerated he did odd jobs whenever he wanted to work. He said that he did not work much but rather "ran around pretty much." The Defendant agreed that, when this incident occurred, he had a drug problem. The Defendant discussed the events that led to these charges. He said that early in the day on May 20, he was at Shirley's house, and this upset Huff because, while he and Huff were dating, he had "fooled around" with Shirley. The Defendant said that he, Huff, Duncan, and Shirley all got into Huff's car, and he was driving and Shirley was in the front passenger's seat. As the Defendant drove by the Dollar Store, Huff and Shirley saw someone with whom they did not get along. Huff wanted to get out and cause a scene. The Defendant said that he already had a warrant for his arrest for a violation of his probation, and he was attempting to avoid jail at all costs. He said that both he and Shirley did not want to go to the Dollar Store, but they let out Huff and Duncan while they waited at a bar called Homestead. The Defendant recalled that Huff and Duncan were gone approximately ten minutes, and, when they came back, they said to hurry up because the police may be on their way.

The Defendant jumped back into the car and drove towards Shirley's house. On the drive back to Shirley's, Huff got upset with the Defendant for going with Shirley and not with her to the Dollar Store. She acted like her feelings were hurt and that she thought that the Defendant was "messing around" with Shirley again. The Defendant said that Huff's phone started to ring, and he threw the phone out of the window. Huff then started "going hysterical," and punched him in the back of the head and clawed and scratched him. The Defendant said that, when they got to Shirley's house, Huff was upset about her phone. He tried to go for a walk by the river to

get away from her. When he was not too far down the road, he heard a car engine “screaming toward” him. He turned around and saw Huff driving recklessly on the wrong side of the road coming straight for him. Huff yelled at him and said that she was going to call the police unless he got into the car.

The Defendant said that he got into the car because he was trying to avoid jail. Huff drove to where the Defendant threw out the cell phone. As soon as they got out of the car, the Defendant started screaming at Huff. He said that he was mad because she tried to hit him with the car and would not let him keep walking. The Defendant said that they were standing in the road yelling at each other, and he thought that the police would be called soon so he got back into the car. Huff got into the passenger’s seat, and the Defendant started punching the car. Huff started yelling at him, and then he hit her two or three times in the face. He said that he hit her harder than he meant to, but he still hit her. The Defendant said that he threw out of the window a film canister of “dope” because he thought that it would be bad to get caught with the “dope.”

The Defendant said that, thereafter, he and Huff began to communicate. Halfway between Cookeville and Sparta, he looked down and saw that there was not much gas in the car. He said that neither he nor Huff had any money, which was how they “pretty much . . . stayed. We practically lived out of her car. We w[ere] just running around wild and strung out.” The Defendant said that, since his family lived right there, he thought he could borrow a little money from them for gas. He testified that when they got to his grandmother’s driveway Huff was crying and did not want anyone to see her. The Defendant said that he did not want anyone to see her either because he had hit her in the mouth. He testified that he ran in and saw his aunt and told her that he had been in a fight with some boy so that she would not ask questions. He got money and, within five minutes, he was back out of the house and he and Huff went and got gas for the car. After getting gas, they went to the Centers’ house.

When they got to the Centers’ house, the Defendant stood outside and talked to Bobby Jr. and Tammy Centers while Huff went inside to use the restroom. The Defendant said that Huff had the phone in her hand, but he did not know who she called, if anyone. The Defendant called Bobby Sr. because he wanted to get away from Huff. Bobby Sr. told the Defendant that he would meet him somewhere, and the Defendant did not remember the rest of the conversation. The Defendant said that he and Huff left and were on their way to Cookeville to find her cell phone and the “dope” container that he had thrown out of the car. When they were on Highway 56, they got into another argument that was “pretty heated, more heated than the way it had been all day.” The Defendant said that the victim started “freaking on [him], kicking at [him] and clawing at [him] and punching [him]” while he was driving. He said that she grabbed a hold of the steering wheel in an attempt to push the car into oncoming traffic.

The Defendant said that, at this point, he hit Huff again and hit her hard. He said that she let go of the steering wheel as soon as he hit her. The Defendant pulled the car over to the side of the road and things “got real[ly] physical for a couple of minutes.” Of this, the Defendant said, “I got carried away. I didn’t mean to do all of that, I didn’t mean to hurt her that bad. But there’s nothing left to say, you know, an excuse to justify it. But I hurt her worse than I intended

...” The Defendant said that he did not know what to do next, so he went to where his mother was working at Burger King. When the Defendant’s mother asked Huff what had happened to her, Huff said that she had been in a car accident, but she did not want an ambulance called. The Defendant told his mother that he had hit Huff, and then he got into his mother’s car and drove away. He talked to his mother later, and she said that Bobby Sr. had picked up Huff.

The Defendant said that he went back to Burger King to get money from his mother, and then he went back to find his pill container. He found both the pill container and Huff’s cell phone, and he gave Huff’s cell phone to Huff’s sister. The Defendant denied ever pointing a gun at Huff or using a knife to cut her. He said that he did not have a gun or knife with him when he was arrested. The Defendant also denied putting Huff into the trunk of the car, and he said that she never asked to go to the hospital.

On cross-examination, the Defendant agreed that he was a drug addict at the time of this incident, and he had only stopped using drugs because he was incarcerated. The Defendant conceded that he had sexual relations with Huff’s sister and that he knew that this would make Huff upset. The Defendant said that there was no excuse for his hitting Huff the first time, but he said that she provoked it by repeatedly yelling at him and attempting to run him over with her car. He said that because Huff “hit [him] and she was yelling at [him]” he hit her three times. When asked, “When it gets to a woman, you’ve got to hit them in the mouth to shut them up don’t you?” the Defendant responded, “Well if they hit you.” The Defendant said that he did not plan where to hit Huff but that every time he hit her, he aimed for her head, specifically her “facial area.” The Defendant said that he did not hit Huff in the face as hard as he could, but he held back because she was a woman.

The Defendant admitted that he was under the influence of methamphetamine during this event. The Defendant said that these first two or three punches to Huff’s face did not cause her nose to bleed. Rather, that occurred later when they were on the side of Highway 56. He said that the first punches “busted” Huff’s lip and made her eye red, and the Defendant knew that it was going to bruise. The Defendant said that he did not think that he chipped Huff’s tooth but that it was possible. The Defendant admitted that he lied to his aunt when he told her that he had been in a fight with another boy, but he only lied to keep her from asking any questions. The Defendant agreed that his aunt said that she did not see anyone in the car, but he said that Huff was in the front seat of the car. The Defendant again denied that Huff was in the trunk.

The Defendant denied going to Gardner’s house as Huff had said, and he also denied going to his friend’s house. The Defendant talked about the second time that he hit Huff saying that he punched her when she had a hold on the steering wheel. He said that, after he pulled the car over, “things got really out of hand” and he “assault[ed] her.” He reiterated that he “hurt her pretty bad[ly].” When asked how many times he hit her, the Defendant said “[t]oo many.” He agreed that the car was safely parked on the side of the road when he lost his “cool” and hit Huff repeatedly. The Defendant said that he did not take Huff to the hospital because she did not want to go. Further, he said that, had she wanted to go, she could have called the ambulance from Burger King. The Defendant said that he regretted what happened but that Huff “put herself in a man’s place when she kept beating on [the Defendant].”

Based upon this evidence, the jury found the Defendant not guilty of especially aggravated kidnapping accomplished by use of a deadly weapon but found him guilty of the lesser-included offense of false imprisonment. The jury also found the Defendant guilty of especially aggravated kidnapping based on his infliction of serious bodily injury to the victim and of aggravated assault.

The trial court sentenced the Defendant, a violent offender, to eleven months and twenty-nine days for the false imprisonment conviction, twenty years for the especially aggravated kidnapping conviction, and five years for the aggravated assault. The trial court ordered that all the sentences run concurrently for an effective sentence of twenty years, to be served at 100%.

II. Analysis

On appeal, the Defendant contends that: (1) the evidence is insufficient to prove that the victim suffered “serious bodily injury,” a necessary precursor to the jury finding him guilty of especially aggravated kidnapping and aggravated assault; and (2) the trial court erred by not merging his convictions for sentencing.

A. Serious Bodily Injury

The Defendant’s first assertion is that the evidence presented at trial was insufficient to support a conviction for especially aggravated kidnapping and aggravated assault because the victim did not suffer a “serious bodily injury.” When an accused challenges the sufficiency of the evidence, an appellate court’s standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Tenn. R. App. P. 13(e)*; *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *Liakas*, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *Id.*

A person commits aggravated assault who “intentionally . . . knowingly . . . or recklessly commits an assault” and “causes serious bodily injury” Tenn. Code Ann. § 39-13-102 (2003). A person commits assault who “[i]ntentionally, knowingly or recklessly causes bodily injury to another.” Tenn. Code Ann. § 39-13-101(a)(1) (2003). Especially aggravated kidnapping is defined as “knowingly remov[ing] or confin[ing] another unlawfully so as to interfere substantially with the other’s liberty . . . where the victim suffers serious bodily injury.” See Tenn. Code Ann. § 39-13-302, -305 (2003).

Serious bodily injury involves “(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” Tenn. Code Ann. § 39-11-106(a)(34) (2003). “Bodily injury” is defined as “a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty[.]” Tenn. Code Ann. § 39-11-106(a)(2) (2003).

In support of his argument, the Defendant relies upon the case of State v. Sims, 909 S.W.2d 46 (Tenn. Crim. App. 1995), in which the adult victim was struck once in the face with a gun during a robbery. Id. at 47-48. She suffered a broken nose and a bruised cheekbone from the blow to her face, as well as two black eyes and a laceration across the bridge of her nose. Id. at 48. She testified that she “experienced extreme physical pain over her whole face, but especially to her nose.” Id. This Court, in determining whether the victim’s injuries constituted “serious bodily injury,” applied the doctrine of *ejusdem generis* to the statute defining “serious bodily injury,” stating:

According to the Sixth Edition of Black’s Law Dictionary, *ejusdem generis* means when words follow an enumeration of classes of things the words should be construed to apply to things of the same general class as those enumerated. Therefore, the enumerated portions of the definition of serious bodily injury should be read as coming from the same class of injuries. We do not believe that the pain commonly associated with a broken nose is extreme enough to be in the same class as an injury which involves a substantial risk of death, protracted unconsciousness, protracted or permanent disfigurement or the loss or impairment of the use of a bodily member, organ or mental faculty.

Id. at 49. The Sims Court went on to indicate that pain is difficult to quantify or measure. Id. As this Court recently stated, the subjective nature of pain is a question of fact to be determined by the trier of fact, in this case the jury. State v. Eric A. Dedmon, No. M2005-00762-CCA-R3-CD, 2006 WL 448653, at *5 (Tenn. Crim. App., at Nashville, Feb. 23, 2006), *no Tenn. R. App. P. 11 application filed*.

Relying on Sims, the Defendant asserts that the pain associated with Huff’s injuries was not in the same class as the other types of injuries enumerated in the statute; therefore, the proof did not establish that Huff suffered serious bodily injury due to extreme physical pain. We disagree. While the evidence of serious bodily injury was not overwhelming, we conclude that

Huff suffered extreme physical pain, which constitutes serious bodily injury. See Tenn. Code Ann. § 39-11-106(a)(34). Unlike the victim in Sims who suffered a single blow to the face, this victim suffered repeated blows to the face. These repeated beatings, which occurred when the Defendant “lost his temper,” and expert medical testimony proved that this caused several fractures to Huff’s nasal and eye areas. When Huff was locked in the trunk of the car, she thought that she was going to die from the beatings and fell in and out of consciousness. The pictures admitted at trial show the victim’s face disfigured from the beating. She had two black eyes, a large bruise to her right temple, an extremely bruised and protruding lip, a swollen and bloodied nose, in addition to scratches, bruises, and abrasions to her neck, hands, and arms. Many of the witnesses who saw her, including the Defendant’s mother, said that she looked badly beaten. Bobby Sr. said that Huff looked in need of medical attention so he took her to the hospital. Huff testified that she was in extreme physical pain. This evidence is sufficient to support the jury’s finding that the victim suffered serious bodily injury, and the Defendant is not entitled to relief on this issue.

B. Merger

The Defendant next contends that the trial court erred by not merging his convictions for sentencing. He asserts that all of these events were part of one single continuing episode. The State concedes that the Defendant’s conviction for false imprisonment should merge with his conviction for especially aggravated kidnapping. It contends, however, that the conviction for especially aggravated kidnapping should not merge with the conviction for aggravated assault.

The double jeopardy clause in the United States Constitution provides that no person “shall . . . be subject for the same offense to be twice put in jeopardy of life or limb” U.S. const. amend V. Similarly, the Tennessee constitution states that “no person shall, for the same offense, be twice put in jeopardy of life or limb.” Tenn. Const. art. I, § 10. The constitutional right against double jeopardy protects against, inter alia, multiple punishments for the same offense. State v. Denton, 938 S.W.2d 373 (Tenn. 1996). In this case, we must determine whether convictions for false imprisonment, especially aggravated kidnapping, and aggravated assault are multiple punishments for the “same offense.”

In State v. Denton, the Tennessee Supreme court established a framework for determining whether a defendant has received multiple punishments for the “same offense.” Denton, 938 S.W.2d at 381. The Court has said that a reviewing court should consider: (1) the statutory elements of the offenses; (2) the evidence used to prove the offenses; (3) whether there were multiple victims or discrete acts; and (4) the purposes of those respective statutes. State v. Beauregard, 32 S.W.3d 681, 683 (Tenn. 2000) (citing Denton, 938 S.W.2d at 381).

1. False Imprisonment and Especially Aggravated Kidnapping

The first issue we will address is whether the trial court erred by not merging the Defendant’s conviction for false imprisonment into his conviction for especially aggravated

kidnapping. The first component of Denton requires us to compare the statutory element of false imprisonment and especially aggravated kidnapping. “A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.” Tenn. Code Ann. § 39-13-302 (2003). Especially aggravated kidnapping is false imprisonment, as defined in section 39-13-302 “accomplished with a deadly weapon” or “[w]here the victim suffers serious bodily injury.” Tenn. Code Ann. § 39-13-305. Accordingly, the elements of especially aggravated kidnapping require proving false imprisonment. As such, under the second component of Denton, the evidence used to prove false imprisonment is the same as the evidence used to prove especially aggravated kidnapping. This case involved only one victim, and the legislative purpose of the two separate statutory offenses seems to be similar and not distinct. The Defendant’s actions in confining the victim constituted a continuing course of conduct and, as such, a single kidnapping offense. See State v. Eric Matthews, No. W2004-00274-CCA-R3-CD, 2004 WL 2381734, at *8 (Tenn. Crim. App., at Jackson, Oct. 25, 2004), *no Tenn. R. App. P. 11 application filed*. Therefore, the trial court should have merged the separate convictions for false imprisonment and especially aggravated kidnapping into a single judgment of conviction.

2. Especially Aggravated Kidnapping and Aggravated Assault

We now turn to decide whether the trial court erred by not merging the Defendant’s conviction for aggravated assault with his conviction for especially aggravated kidnapping. Again, pursuant to the first component of Denton, we look at the statutory elements of the offenses. A person commits aggravated assault who intentionally, knowingly or recklessly commits an assault, as defined in section 39-13-101, and causes serious bodily injury to another or uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102(a) (2003). As previously stated, especially aggravated kidnapping is false imprisonment, as defined in section 39-13-302 “accomplished with a deadly weapon” or “[w]here the victim suffers serious bodily injury.” Tenn. Code Ann. § 39-13-305. These two statutory offenses contain separate and distinct elements. The kidnapping offense, as relevant to this case, involves false imprisonment where the victim *suffers* serious bodily injury. Conversely, the assault offense requires that the perpetrator of the assault *cause* the serious bodily injury. This makes the statutory elements of the offenses dissimilar. Further, the evidence used to prove these offenses is different, as is the purpose of the two statutes. Finally, while there was only one victim, there were discrete acts by the Defendant because he repeatedly beat her with his closed fist and by smashing her face into the car dashboard and, at only one point, did he lock her in the trunk of the car. Considering the Denton factors, we conclude that the trial court did not err when it refused to merge the aggravated assault conviction with the conviction for especially aggravated kidnapping. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing authorities and reasoning, we conclude that the Defendant’s conviction for false imprisonment should have merged into his conviction for

especially aggravated kidnapping, and we therefore reverse that finding of the trial court. In all other respects, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE